

1 his burden of production favoring detention, it does not  
2 disappear entirely but remains a factor to be considered  
3 among those weighed by the district court.

4 This is citing *United States v Rodriguez*, 950  
5 F.2d 85, *United States v Martir*, 782 F.2d 1141, both  
6 Second Circuit cases, the first from 1991, the second from  
7 1986.

8 And the *Mercedes* case, at 254 F.3d 433.

9 The government retains the ultimate burden of  
10 persuasion by clear and convincing evidence that the  
11 defendant presents a danger to the community. The  
12 government also retains the ultimate burden of persuasion  
13 that the defendant presents a risk of flight by a  
14 preponderance of the evidence.

15 To determine whether the presumptions of  
16 dangerousness and flight are rebutted, I must consider the  
17 nature and circumstances of the crime charged, the weight  
18 of the evidence against the defendant, the history and  
19 characteristics of the defendant, including family ties,  
20 employment, past conduct, and the nature and seriousness  
21 of the danger to the community for the individual.

22 I don't think there is any difference in your  
23 opinions about the nature and the circumstances of the  
24 crime charged. It is a very serious crime, I have already  
25 said that, and of course the penalties are very heavy.

12

1 Now, the weight of the evidence against this  
2 defendant. Is it circumstantial or direct? I need a  
3 proffer from the government more than a recorded  
4 conversation, which indeed is subject to many  
5 interpretations and which formed the bulk of the  
6 discussion at our last meeting.

7 So, Mr. Ryan, I leave it to you at this point.

8 MR. RYAN: Judge, the evidence that the  
9 government will present at trial will show that this  
10 defendant was a member of the Gambino crime family  
11 supervising the drug distribution of an individual by the  
12 name of Gus Fakiris who had a drug delivery service that  
13 he used.

14 THE COURT: Who is *he*?

15 MR. RYAN: Mr. Fakiris.

16 MR. FROCARRO: He is the fellow with the tapes,  
17 Judge.

18 THE COURT: I know that. I didn't know if the  
19 pronoun referred to your client or Mr. Fakiris.

20 MR. FROCARRO: Okay.

21 MR. RYAN: Mr. Zaccaro had a drug cultivation  
22 and distribution system, hydroponic drugs, and was an  
23 associate of the Gambino crime family.

24 The evidence will show that Mr. Zaccaro made an  
25 arrangement with this defendant, Mr. Ruggiero, to

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1 essentially buy access to the drug distribution  
2 individual, Gus Fakiris, he controlled to distribute the  
3 drugs produced by Mr. Zaccaro.

4 There was an arrangement, a fee arrangement,  
5 made between Mr. Zaccaro and --

6 THE COURT: Sort of a distribution route?

7 MR. RYAN: It was a distribution route that was  
8 essentially paid for per pound.

9 Arrangement was made for payments per pound to  
10 Mr. Ruggiero for the drugs that were then -- the Zaccaro  
11 drugs that were then sold to Mr. Fakiris.

12 Mr. Fakiris then was beaten by Mr. Ruggiero and  
13 others and forced to comply with this, and received  
14 additional beatings throughout the period of time that he  
15 was under the direction and control of Mr. Ruggiero  
16 distributing Mr. Zaccaro's drugs, and delivered hundreds  
17 of thousands of dollars of cash to Mr. Ruggiero in  
18 connection with this drug distribution of Mr. Zaccaro's  
19 drugs.

20 THE COURT: Will the evidence be circumstantial  
21 or direct?

22 MR. RYAN: It will be both, Judge. Both the  
23 individuals that were involved in the conversations as  
24 well as coconspirators who were aware of the arrangement  
25 as well. And of course there will be direct evidence

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1 concerning the drug operations.

2 THE COURT: And the violence?

3 MR. RYAN: And the violence.

4 THE COURT: The physical violence.

5 MR. RYAN: The physical violence.

6 MR. FROCARRO: Judge, in terms -- he says  
7 direct. They have two cooperating witness. It's  
8 Mr. Fakiris and Mr. Zaccaro.

9 THE COURT: I don't have any idea what they  
10 have. Do you know what they have?

11 MR. FROCARRO: I do know.

12 The tapes I brought out to your Honor contradict  
13 every word Mr. Ryan said. I'm not saying Mr. Ryan is not  
14 credible. I'm saying that Mr. Fakiris is not credible.

15 THE COURT: That is up to a jury.

16 MR. FROCARRO: But, Judge, no, that is up to the  
17 tapes.

18 The tapes, they say flat out, Mr. Fakiris says  
19 to Mr. Ruggiero that Mr. Zaccaro was the one who was  
20 visiting violence upon him. And in the context of their  
21 conversations, Mr. Ruggiero says to Mr. Fakiris: *I told*  
22 *you you have to be out of this business. You have to have*  
23 *nothing to do with it.*

24 There is a concern on those tapes from Mr.  
25 Fakiris that Mr. Zaccaro was cooperating. Once Angelo

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1 dusts off the hot seat for us, if Mr. Zaccaro is  
2 cooperating, Fakiris should have concern for himself, and  
3 Mr. Ruggiero has no concern.

4 THE COURT: Once again we are reading things  
5 into those tapes. I don't want to hear any more about the  
6 tapes.

7 MR. FROCARRO: Judge, you have a proffer from a  
8 government lawyer. There is not a witness under oath,  
9 judge. And what you have is his cooperating witness'  
10 actual words for tapes that were produced at the direction  
11 of the government, Judge.

12 THE COURT: You are saying those tapes --

13 MR. FROCARRO: That should corroborate --

14 THE COURT: Excuse me. Are you saying that  
15 those tapes, that conversation, which is certainly subject  
16 to interpretation, absolves your client from any claim of  
17 any alleged behavior against Mr. Fakiris?

18 MR. FROCARRO: I think it absolutely does. It  
19 absolutely does. Because what he says is that Mr. Zaccaro  
20 put a gun to his head so he stays in the business.

21 And he says to Mr. Ruggiero, I know you didn't  
22 know about this. All right? And Angelo says to him, you  
23 shouldn't have been in the business with this guy.

24 Judge, I think it absolutely clears him.

25 That is not the only tape. There is other tapes

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1 between Mr. Paradisio, who is supposed to be a captain  
2 with this organized crime family, and Mr. Fakiris. And on  
3 it Fakiris says to Mr. Paradisio that I lied to you guys,  
4 meaning him and Ruggiero, all along. I'm still dealing  
5 drugs even though I was instructed to get out of that  
6 business.

7 That further corroborates that Mr. Ruggiero is  
8 not involved.

9 And the other thing I want to say, judge, is, I  
10 know prosecutors are allowed to proceed by proffer. It is  
11 a big advantage for them, you know, if I don't have access  
12 to these witnesses on the witness stand.

13 But what Mr. Ryan represented to the court in  
14 order to get my client remanded way back when was that  
15 Mr. Ruggiero was responsible for supervising this  
16 marijuana thing for the Gambino crime family.

17 If your Honor may recall, during the last court  
18 appearance, in order to diffuse my argument about the  
19 tapes, what Mr. Ryan said was now that Mr. Ruggiero was  
20 doing it behind Mr. Paradisio's back.

21 That is totally inconsistent with what they  
22 argued in order to get him remanded. That is the only  
23 answer they could give for the tapes, because it is clear  
24 that Mr. Ruggiero is not involved in Mr. Fakiris' or  
25 Mr. Zaccaro's activities.

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1 In fact one statement Mr. Ruggiero makes to  
2 Mr. Fakiris on the tapes is, you know, I never liked  
3 Zaccaro, that's why I never had anything to do with this  
4 guy.

5 If Mr. Fakiris is wearing a wire for the  
6 government. All he has to say to Mr. Ruggiero is, *What*  
7 *are you talking about? We have been dealing drugs with*  
8 *this guy for the last three years. What are we going to*  
9 *do? He is going to become a cooperator.*

10 With all due respect, Judge, it is not subject  
11 to any other interpretation that my client wasn't  
12 involved. And why I emphasize it is, again, I'm not going  
13 to get this witness on the stand before my client sits in  
14 jail for a year, and now more time possibly. The only  
15 thing I have --

16 THE COURT: We are talking about two months.

17 MR. FROCARRO: Judge, two months: It is easy  
18 for him to say. Way back in October when we demanded a  
19 trial he said February.

20 THE COURT: Let's not change the position here.  
21 We can look at a trial in early May, for sure.

22 Now, anything more? Not on the tapes. Anything  
23 else about the dangerousness --

24 MR. FROCARRO: I just want to say one thing  
25 about the trial, too.

18

1 THE COURT: No. I'm going to ask you to address  
2 the factors that I am considering now.

3 MR. FROCARRO: Okay. Another factor in terms of  
4 the strength of their case?

5 THE COURT: No. The strength of the case.

6 MR. FROCARRO: Another factor, judge?

7 They seized drug records from those marijuana  
8 warehouses. There is not one thing in those records that  
9 links Mr. Ruggiero to the marijuana growing. Not one  
10 thing.

11 THE COURT: In terms of surveillance. I thought  
12 he said it had to do with distribution, not the growing.

13 MR. FROCARRO: They had records of who they were  
14 distributing to.

15 THE COURT: I don't know.

16 MR. FROCARRO: I'm telling your Honor. I know a  
17 lot more about it by virtue of obviously my familiarity  
18 with the case.

19 Not one thing linking Angelo. No records  
20 whatsoever in the world linking Angelo to that operation.

21 In terms of surveillance, the Nassau County cops  
22 had the growing warehouses under surveillance. Not one  
23 surveillance of Angelo Ruggiero ever having been there,  
24 judge.

25 In terms of his history and characteristics, he



19

1 has no priors.

2 THE COURT: We are not up to that yet.

3 MR. FROCARRO: I'm jumping?

4 THE COURT: We are talking about the strength of  
5 the case.

6 MR. FROCARRO: Judge, then I really don't think  
7 there is anything else that I can say to convince your  
8 Honor that they do not have a strong case here.

9 THE COURT: Mr. Ryan?

10 MR. RYAN: Judge, the evidence is of the  
11 individuals who were involved, primarily. Certainly,  
12 there is substantial evidence to show that the operation  
13 did exist, that Mr. Fakiris was involved.

14 Mr. Fakiris' testimony will show that he was  
15 under the control of Mr. Ruggiero because of his  
16 association with the Gambino crime family and that the  
17 arrangements were made as we have indicated.

18 The tapes occurred later on as an extortion from  
19 his junk business, from when the Gambino crime family was  
20 demanding money from the junk business after Mr. Fakiris.

21 THE COURT: Who, *he*?

22 MR. RYAN: Mr. Fakiris was in fact told by them  
23 and indicated --

24 THE COURT: Who is *them*?

25 MR. RYAN: Excuse me. Sorry, Judge. He was

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1 told by Mr. Ruggiero and Mr. Paradisio to get out of the  
2 marijuana business at one time and they were just going to  
3 extort money from his junk business in The Bronx. And  
4 that is in fact what they were doing when the tapes were  
5 made.

6 It was some years after he had indicated to them  
7 that he had stopped dealing with Mr. Zaccaro. And that is  
8 the nature and content of those tapes.

9 THE COURT: All right. Now let's talk about  
10 history and characteristics of the defendant.

11 MR. FROCARRO: Judge, my client has no prior  
12 convictions for anything involving violence whatsoever.

13 THE COURT: He does have a pending case in the  
14 Southern District.

15 MR. FROCARRO: That is a case where Judge  
16 McKenna heard all the evidence and he said, you know what?

17 THE COURT: What are the charges?

18 MR. FROCARRO: Extortion involving Mr. Fakiris.  
19 That's what charges are.

20 Judge McKenna heard the tapes, your Honor, he  
21 didn't focus on the extortion portion, but if you hear the  
22 tapes, all my client ever says to him: *I love you guys.*  
23 *We have been friends for years. I have never taken*  
24 *anything off you that I didn't work for. What's going on*  
25 *here?* That's it.

1 Judge McKenna heard the tapes and immediately  
2 ordered my client released on a bond.

3 MR. RYAN: I believe, judge, it is a  
4 multimillion dollar bond with restrictions, for that  
5 particular case.

6 THE COURT: All right. Other characteristics  
7 and history of the defendant: Family ties, employment,  
8 community ties, past conduct.

9 MR. FROCARRO: Judge, I know they are not  
10 labeling it that he is a flight risk, but in terms of his  
11 family ties, he has very strong ties to the community.

12 He has a wife and three young children. He had  
13 legitimate employment, at the time he was arrested, for  
14 quite a period of time prior to his arrest. And in fact  
15 he files tax returns, judge.

16 THE COURT: What is that employment?

17 MR. FROCARRO: He worked at an auto shop  
18 business, Judge. That is where he worked, auto parts  
19 business.

20 MR. RYAN: Junkyard, judge, essentially.

21 MR. FROCARRO: It is more politically correct an  
22 auto parts business, Judge. That is where he works.

23 THE COURT: Where does he live?

24 MR. FROCARRO: He lives with his wife and kids.

25 THE DEFENDANT: I live in Howard Beach. I live

1 in an apartment.

2 MR. FROCARR0: He doesn't own his house. They  
3 live in an apartment.

4 THE COURT: All right. The nature and  
5 seriousness of the danger to the community or to an  
6 individual.

7 What is the danger, to whom, and based on what?

8 MR. RYAN: Judge, there have been threats made  
9 against Mr. Fakiris by numerous individuals as a result of  
10 the fact that it has been revealed that he's cooperating  
11 in this case. We believe that because --

12 THE COURT: Numerous individuals. But what  
13 about this defendant?

14 MR. RYAN: We believe, judge, that this  
15 defendant, which we are alleging is a member of the  
16 Gambino crime family, has the associations, connections,  
17 and wherewithal to be able to cause harm to Mr. Fakiris.

18 We believe that Mr. Fakiris is at risk. At  
19 extreme risk. We have recommended that he go into the  
20 witness protection program as quickly as possible. And we  
21 believe that this defendant's freedom would cause  
22 potential harm to Mr. Fakiris.

23 There is long history in the Gambino crime  
24 family of dealing violence to witnesses and to the  
25 administration of justice, and we believe that this

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1 defendant has connections that would be able to effect  
2 harm to individuals in this case.

3 MR. FROCARRO: Judge, with all due respect,  
4 Mr. Fakiris would be the best witness that I could have in  
5 my case.

6 THE COURT: You are going to have him your case.

7 MR. FROCARRO: I wouldn't want a hair touched on  
8 his chest. He's not going to say anything that's going to  
9 hurt my client.

10 He would be the most important witness we can  
11 call, No. 1, because he's going to clear my client.

12 No. 2, my client knows if anything happened to  
13 that fellow, all his statements come in without cross,  
14 which would be the worst thing that could happen to us.

15 In terms of being scared of Mr. Ruggiero, here  
16 is what your Honor has to consider.

17 Mr. Ruggiero's mother was dying from cancer at  
18 the time that he was arrested and your Honor was gracious  
19 enough to allow him to go to his mother's wake.

20 This man was so afraid of Mr. Ruggiero that he  
21 had the gall to show up at his mother's wake. Everyone  
22 knew he was cooperating at the time. Nothing happened to  
23 him. He was there. He's about the safest individual  
24 there is on the place of the earth right now, judge.

25 THE COURT: You might want to pass that on to

24

1 Mr. Fakiris.

2 MR. RYAN: I'm not going to say anything, judge.

3 THE COURT: Anything else as far as the  
4 community or an individual?

5 MR. RYAN: No, judge. I believe that the record  
6 is sufficiently clear.

7 MR. FROCARRO: Judge, if I can just. The  
8 package that I have offered to your Honor is a very  
9 substantial bond. And it is a restricted bond. It is a  
10 bond where --

11 THE COURT: You know, that is my next question  
12 to the government.

13 If he is under house arrest, what is the fear of  
14 the danger to the community?

15 MR. RYAN: It is the individuals he meets with,  
16 Judge, the individuals that he associates with, and the  
17 planning that he can do under those circumstances. Things  
18 that he would not be able to do with those individuals at  
19 a jail because people would not wish to be identified.

20 THE COURT: Is there no way of making certain  
21 that he doesn't meet?

22 MR. RYAN: Judge, under the Second Circuit  
23 ruling in *US V Arena*, the Second Circuit has indicated  
24 that the restrictive type of witness lists, no organized  
25 crime visitors, the type of expense and the type of

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1 personnel that would be needed to be able to put the same  
2 type of restrictions on is just not an appropriate way to  
3 deal with these type of situations.

4 They have said in *Arena* that if the court is  
5 thinking of all those restrictions, then you might as well  
6 keep him in jail.

7 And that is the problem that we have, because we  
8 would have to essentially post either a guard or some sort  
9 of limitation; to put, to record his phone calls, to be  
10 able to ensure that that is the only method he has of  
11 communicating, to be able to restrict visitors, all the  
12 types of things that he is under those restrictions, now,  
13 of necessity, given the way the jail works. To be able to  
14 do that artificially in a home location just is not a  
15 practical solution and not -- even if we tried to do it,  
16 essentially we can't guarantee that's done.

17 MR. FROCARRO: Judge, I'm very familiar with the  
18 *Arena* case.

19 So your Honor can apply it in the proper  
20 context, it was a case involving the Colombo family war  
21 where 17 people were murdered, judge. They were out in  
22 the street, like Wild Bill Hickock, shooting people. That  
23 is the context.

24 Patty Amatto was the defendant. In a case of  
25 allegations like that, of 11 murders, there are no

1 conditions or combination of conditions that can  
2 reasonably assure the safety of the community.

3 You want to know? I think they were right.  
4 There was this interfamily war going on where everyone was  
5 getting shot.

6 THE COURT: I'm sure the circuit will be  
7 thrilled to hear that you think that.

8 MR. FROCARRO: Thanks. But Judge, the point --

9 THE COURT: Tell the circuit that Mr. Frocarro  
10 said *right on* on the Amatto case.

11 MR. FROCARRO: The point being you had an  
12 interfamily war involved in a conspiracy to murder 17  
13 people.

14 THE COURT: I think there is something to be  
15 said for it because I was thinking in terms of even more  
16 restrictions. And the point, as the Second Circuit has  
17 apparently and even you say correctly found, if you are  
18 talking about imposing phone restrictions and visitor  
19 restrictions and access to different people restrictions,  
20 then the person might as well be incarcerated.

21 I will tell you what I willing to do. I am  
22 willing to have pretrial services interview him.

23 MR. FROCARRO: Judge, if I could just be heard a  
24 little more.

25 THE COURT: Sure.



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1 MR. FROCARR0: Judge McKenna heard the same  
2 thing. And you are a different judge, but he ordered  
3 release on house arrest. I have been involved in murder  
4 cases. Most recently I had a client charged with two  
5 murders, before Judge Garaufis, named Restivo.

6 Judge Garaufis released him on bail on house  
7 arrest and he limited who can come into the house. He was  
8 only allowed out for legal meetings and medical emergency.

9 THE COURT: What about his telephone?

10 MR. FROCARR0: Telephone, they didn't even need  
11 to in that case. And the government never appealed that  
12 order. But we would have consented to it, judge. The  
13 bottom line being -- and there was no motion whatsoever  
14 during the course that he was out on bail.

15 I can list for your Honor about 10 or 15 other  
16 cases where defendants were charged with murder, not  
17 marijuana conspiracies, where the strength of their case  
18 is not iron clad, not strong. I think Mr. Ruggiero, with  
19 all due respect, is a prime candidate for release on house  
20 arrest.

21 If they have any problem, if Mr. Fakiris is  
22 threatened, he can get remanded. And his family, who is  
23 willing to post all they own, will lose everything.

24 Under those circumstances Mr. Ruggiero would  
25 really have to be a very selfish individual and very

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1 stupid individual.

2 I have fought with your Honor continuously to  
3 try to get him bail so that he could just go out and be  
4 with his family.

5 If your Honor releases him, he will comply with  
6 every single condition that your Honor imposes. He will  
7 not let your Honor down. He will not let his family down.

8 MR. RYAN: Judge, this is a presumption case,  
9 and unlike those other cases it is a case --

10 MR. FROCARRO: Those were presumption cases.  
11 Murder cases. They have probably an absolute presumption.

12 MR. RYAN: Unlike the case before Judge McKenna,  
13 there is multiple violence in this case.

14 THE COURT: Are you saying there was no  
15 presumption in the case before Judge McKenna?

16 MR. RYAN: No.

17 MR. FROCARRO: Crimes of violence.

18 MR. RYAN: The extortion case? No, judge.

19 MR. FROCARRO: It is crimes of violence, judge.

20 THE COURT: There was no presumption.

21 MR. FROCARRO: It is not a presumption case.

22 MR. RYAN: It is not a presumption case. This  
23 is a case of presumption.

24 There is a history of violence in this  
25 particular conspiracy. While there may have been

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1 threatened violence in the extortion, there is no actual  
2 violence, as exists here.

3 THE COURT: You know, we do have pretrial, am I  
4 correct, in the back the courtroom?

5 A SPECTATOR: Yes, judge.

6 THE COURT: How long would it take for you to  
7 draw something up regarding --

8 A SPECTATOR: In terms of --

9 THE COURT: -- conditions and so forth?

10 A SPECTATOR: I discussed this with Mr. Ketcham,  
11 about a release order?

12 THE COURTROOM DEPUTY: I think what the judge  
13 means is, to do --

14 THE COURT: -- a workup.

15 A SPECTATOR: -- an amended report? Shouldn't  
16 take that long at all.

17 THE COURT: Was there an initial report?

18 A SPECTATOR: Yes.

19 MR. FROCARRO: Before you look at it, I'm going  
20 to tell you. You know I'm impetuous, Judge. If you want  
21 me to shut up, I will always shut up.

22 In the initial report, the government provided  
23 pretrial services with information that he was involved in  
24 a murder. They came back with a recommendation. They  
25 made no allegation he was involved in a murder. Just so

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1 your Honor is aware of that.

2 MR. RYAN: Attempted murder, Judge.

3 THE COURT: Can I ask you something?

4 MR. FROCARRO: I have the report with me.

5 THE COURT: I was going to ask you if you are  
6 aware of any case similar to this one where the circuit  
7 has found that the presumption has been overcome.

8 MR. FROCARRO: Off the top of my head? No. But  
9 I will be honest with your Honor, in marijuana cases --

10 THE COURT: Please. Always.

11 MR. FROCARRO: -- I fight to get my clients out  
12 on bail. I'm just telling you truth.

13 THE COURT: How many cases do you have like  
14 this?

15 MR. FROCARRO: Not in Central Islip, thank  
16 goodness.

17 THE DEFENDANT: Not in Central Islip.

18 THE COURT: What is the case?

19 THE DEFENDANT: I have it in my book.

20 MR. FROCARRO: Get it.

21 THE DEFENDANT: I've got two cases for you.  
22 Second Circuit.

23 (Counsel and client confer.)

24 MR. FROCARRO: Judge? I'm embarrassed to say  
25 that my client has two cases.

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1 THE COURT: Whoa! Whoa! Whoa. Did you tell me  
2 he had never been convicted?

3 MR. FROCARRO: Of a crime of violence? Never.

4 THE COURT: Of a crime of violence.

5 MR. FROCARRO: Sure. Absolutely.

6 THE COURT: Oh. Okay. What were you about to  
7 say?

8 MR. FROCARRO: My client, I'm embarrassed to  
9 say, has two cases. One is *United States v Ojeda Reyes*.

10 THE COURT: Cite the case.

11 MR. FROCARRO: 846 F.2d 167.

12 THE COURT: The library at the jail is aces,  
13 right?

14 MR. FROCARRO: *United States v Gonzales Claudio*.  
15 The cite is 806 F2d 334, your Honor.

16 THE COURT: My clerk will bring that to me.

17 MR. RYAN: Judge, these are both cases involving  
18 due process release of defendants: one after 32 months of  
19 pretrial delay that was attributable to the government,  
20 and the other one where the delay was primarily  
21 attributable to the government on due process grounds.

22 THE COURT: Presumption cases?

23 MR. RYAN: It doesn't say so, judge.

24 MR. FROCARRO: Yes.

25 MR. RYAN: This is a due process analysis that

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1 has nothing to do with the presumption.

2 THE COURT: Based on speedy trial.

3 MR. RYAN: Based on constitutional due process  
4 delay.

5 THE COURT: Still, speedy trial as opposed to  
6 statutory.

7 MR. RYAN: As opposed to statutory.

8 MR. FROCARRO: Can I just add one thing to that,  
9 judge, then?

10 I have made an argument to your Honor that at  
11 least 180 days of nonexcludable delay had accumulated  
12 under the act with respect to the charge he was arrested  
13 for.

14 There is also a case *United States v Gambino*  
15 which the clock from that case is going to come over to  
16 the second case. So the government in my opinion has also  
17 clearly violated his speedy trial rights.

18 THE COURT: That is a whole nuther application.

19 MR. FROCARRO: But he is saying that that is  
20 what that case deals with. So if that is a factor for  
21 your Honor to consider, it is out there.

22 THE COURT: How many prior convictions does your  
23 client have for nonviolent crimes?

24 MR. FROCARRO: For nonviolent crime, I believe  
25 three, Judge.

1 THE DEFENDANT: One case. All consolidated  
2 parts.

3 MR. FROCARRO: One case, all consolidated,  
4 judge.

5 THE COURT: '96?

6 MR. FROCARRO: Yes.

7 THE COURT: Criminal possession of a weapon.

8 MR. FROCARRO: Dismissed.

9 THE COURT: Really? Sentenced one to three  
10 years. Sentenced 10/13/98.

11 MR. FROCARRO: That is not the case that he was  
12 sentenced on, judge. That was a bank.

13 What the case involved, so your Honor is aware,  
14 it was a case where they deposited inadvertently, the  
15 banks, like \$100,000-something.

16 THE COURT: It was possession of a firearm.

17 MR. FROCARRO: But that case was dismissed,  
18 Judge. That is not the one that he was convicted of.

19 MR. RYAN: I believe --

20 MR. FROCARRO: He wasn't convicted. It was  
21 dismissed.

22 MR. RYAN: They were combined, judge. I believe  
23 he was sentenced on, the illegal possession of a vehicle  
24 identity number was the felony, but it appears that the  
25 others were dismissed in satisfaction.

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1 THE COURT: What about this? Is this the same  
2 case in December of '96, grand larceny?

3 MR. FROCARRO: That is the case with the bank,  
4 judge.

5 THE COURT: Do you want pretrial services to do  
6 an amended report or not?

7 MR. FROCARRO: If your Honor wants it. I want  
8 your Honor -- I think....

9 THE COURT: I would like to see those two cases.

10 MR. FROCARRO: We have them right here.

11 Can I say one other thing? The government  
12 doesn't appeal the ones that they don't think they can  
13 win.

14 There are so many murder cases I worked on that  
15 they got bail but --

16 THE COURT: No.

17 MR. FROCARRO: But there is so many.

18 THE COURT: I can't say what the government  
19 does. You can't say what the government does. Who knows?

20 You are saying these were appealed, though.

21 MR. FROCARRO: Those decisions? The cases that  
22 we cite? They are Second Circuit decisions.

23 THE COURT: The circuit found a presumption.

24 MR. FROCARRO: The circuit said that bail was  
25 warranted under those circumstances. He just handed me



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1 the case.

2 THE COURT: They were presumption cases.

3 MR. FROCARRO: I believe that they were. Under  
4 the circumstances of the case, they found that they had  
5 violated their speedy trial rights.

6 THE COURT: So it wasn't based on what we have  
7 here, which is a question of whether the presumption has  
8 been overcome.

9 MR. FROCARRO: No, I don't believe they were,  
10 Judge. They weren't.

11 THE COURT: It is a whole different thing, then,  
12 really.

13 MR. FROCARRO: But it isn't, your Honor, with  
14 all due respect, because they violated his speedy trial  
15 rights clearly on the --

16 THE COURT: If you want to make an application  
17 based on speedy trial, then go ahead, but that is not what  
18 we are about today.

19 MR. FROCARRO: No. But if that is what those  
20 cases say, then that is a factor for the court to  
21 consider.

22 I did argue, in the context of that, the case  
23 should be dismissed with prejudice, that speedy trial had  
24 been violated.

25 THE COURT: Let's not confuse the application

1 again.

2 If you want a make an application based on  
3 constitutional due process, failure to prosecute or to  
4 observe appropriate speedy trial time, that is fine. But  
5 that is not what we are about today.

6 MR. FROCARRO: Okay.

7 THE COURT: I have no problem with you making  
8 that application, but that is not what we are about today.

9 So is it worth while for me to read those cases?

10 MR. FROCARRO: I would say no.

11 THE COURT: Thank you. Okay.

12 MR. FROCARRO: Judge, were willing, for  
13 Mr. Ruggiero, to go the extra yard. If your Honor wants a  
14 list that he can't see anyone except for certain family  
15 members, we are fine with that. If you want the phone  
16 monitored, we are fine with that, which is more than Judge  
17 McKenna ordered.

18 THE COURT: Different case.

19 MR. FROCARRO: That is why I'm volunteering  
20 more.

21 THE COURT: Different judge.

22 MR. FROCARRO: I know.

23 THE COURT: Off the record now.

24 (Discussion off the record.)

25 THE COURT: We are correct that there is no

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1 question of flight here. You are not concerned about  
2 flight.

3 MR. RYAN: No, judge. We are concerned with  
4 dangerousness to the community and the presumption.

5 THE COURT: I actually think that this case is  
6 closest to the case of *United States v Mercedes*. In that  
7 case the district court had actually found that the  
8 government had failed to meet its burden, and there was a  
9 reversal based on the fact, and this is what the Circuit  
10 said: *"We agree with the government that these factors,*  
11 *that is the statement that he was not a flight risk, he*  
12 *was willing to be monitored at home with extensive bail*  
13 *conditions, they said the factors that were considered*  
14 *cannot outweigh the presumption."*

15 And then they went on to say: *"We need not*  
16 *address the broader question of whether these showings can*  
17 *ever rebut the presumption of dangerousness."*

18 MR. FROCARRO: But, judge, then you could never  
19 get bail on a presumption case. That is impossible.

20 The presumption has got to be rebutted, and in  
21 conjunction with --

22 THE COURT: In that case, which is the closest I  
23 could find to this, there was not such a finding, and the  
24 Circuit reversed the district court for that.

25 So I don't know what would constitute

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1 rebutting the presumption, but I would have to say, based  
2 upon what has been elicited here, considering the factors,  
3 there hasn't been an overcoming of the presumption.

4 MR. FROCARRO: But Judge, the way it is  
5 rebutted, your Honor, from my knowledge of the law and his  
6 prior characteristics, he has no violence --

7 THE COURT: They say take all the factors  
8 together, which I have to do. I can't take one and not  
9 the other.

10 MR. FROCARRO: How could anybody ever get bail  
11 on a production case then? You are saying it's impossible  
12 to rebut.

13 THE COURT: I'm not saying it is impossible, but  
14 it would require more than what is here.

15 MR. FROCARRO: What more can I do?

16 THE COURT: I don't know. That is a rhetorical  
17 question.

18 MR. FROCARRO: But Judge, in these murder cases  
19 I have worked on, there is a presumption, the same  
20 presumption that your Honor is reading there, and in fact  
21 in that case he was involved in violence. It is a murder.  
22 There's no more serious crime under federal law. Life, no  
23 parole. These men are getting bail because the  
24 presumption is rebutted.

25 When I say rebutted, it is rebutted in terms of

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1 the strength of the case; rebutted in terms of the fact  
2 that there are a condition or a combination of conditions  
3 that will reasonably assure the safety of the community.

4 If the logic was that any time someone is  
5 charged with a presumption crime they can't get bail, our  
6 jails would be overflowed. Nobody would be able to get  
7 bail. Every drug case is a presumption case, just about.

8 It is discretionary. I am not going to give you  
9 a definition of what constitutes rebutted. It is  
10 something that is discretionary. Your Honor factors in  
11 all those different factors.

12 THE COURT: If you want me to go through all  
13 the factors, I am happy to do that. And I have to say --  
14 I'm not happy to say but I have to say -- that they do not  
15 weigh in favor of release if I went through them.

16 If anything, considering the very serious nature  
17 of the crime, which definitely weighs in favor of  
18 continued detention, the weight of the evidence in this  
19 particular case, not taking into account anything that was  
20 said about future indictments or other cases, weighs  
21 50/50. It doesn't way in your favor.

22 MR. FROCARRO: But 50/50 is not a preponderance.

23 THE COURT: It is one factor. There is no  
24 statement by the Circuit that one factor trumps all the  
25 others. That is not at all what it says. It says the

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1 presumption is still a factor to be considered even if you  
2 do rebut it.

3 So even assuming that you can rebut it, I would  
4 still, considering all five factors, have to say the  
5 detention is warranted here. I'm sorry.

6 MR. FROCARRO: I know. But if you look at every  
7 factor, if he had a history of violence I would tell your  
8 Honor, I would actually tell your Honor you are right.

9 THE COURT: It doesn't say history of violence.  
10 It says history and characteristics.

11 The history shows prior convictions. Perhaps  
12 not of a violent nature, but there is definitely a history  
13 here. And the allegations regarding the danger to an  
14 individual, the possible testifying witnesses, you know, I  
15 have to say --

16 MR. FROCARRO: That is inherent in every case.

17 THE COURT: You can't keep coming back at me.

18 I have to tell you I have gone through every  
19 single factor, the way that I'm required to do, and I feel  
20 comfortable now. I was not comfortable, frankly, after  
21 our last meeting because I felt that I was perhaps putting  
22 the cart before the horse regarding the dismissal  
23 application. I told you that. But I think that based  
24 upon what has come forth this afternoon, that the  
25 defendant must be detained.

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1 MR. FROCARRO: Can I just say one thing so there  
2 is a complete record, judge?

3 THE COURT: Absolutely.

4 MR. FROCARRO: In case there is an appeal?

5 THE COURT: Absolutely.

6 MR. FROCARRO: I do not have to make a speedy  
7 trial motion for your Honor to consider the fact --

8 THE COURT: I think you do.

9 MR. FROCARRO: No. -- that he has been in.  
10 That he has been in. And also --

11 THE COURT: Excuse me. You are doing it on a  
12 statutory basis or constitutional?

13 MR. FROCARRO: Both.

14 THE COURT: Well, you certainly do have to make  
15 a motion, and you must detail the number of days that you  
16 feel there was no consent and the days that consent was  
17 given, and so forth.

18 MR. FROCARRO: But I did that in the context of  
19 my Rule 48, Judge.

20 THE COURT: No, you did not. You did not detail  
21 from this date to this date, from this date, from this  
22 conference to this conference.

23 MR. FROCARRO: On August 17 I said we are ready  
24 for trial, and every time after that I said we are ready  
25 and did not waive. I submitted that in the course of my

1 Rule 48 papers.

2 THE COURT: But that is not an application for a  
3 speedy trial dismissal.

4 MR. FROCARRO: But that is, I'm just saying in  
5 the context of bail. Your Honor, I'm sorry. I just don't  
6 agree.

7 THE COURT: I know you don't.

8 MR. FROCARRO: We are going to be taking an  
9 appeal. It is going to happen a lot. That is why there  
10 is appellate courts.

11 THE COURT: Maybe yes. Maybe no. Who knows?

12 MR. FROCARRO: The only thing I would say is, we  
13 were ready to go to trial. In affect the government  
14 caused it to be canceled. And the net benefit to the  
15 government is that he just sits in jail.

16 THE COURT: You can address in your speedy trial  
17 motion that these days from February 5 until whatever the  
18 date we actually go to trial should not count against him.  
19 But, yes, it requires a written motion.

20 So the defendant at this point is remanded.

21 THE COURTROOM DEPUTY: March 29 at 11:30, with  
22 the codefendant, for a pretrial conference.

23 MR. FROCARRO: Take care.

24 (Proceedings adjourned at 3:20 pm.)  
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